

end customer is located. Therefore, Level 3 reasoned CenturyTel's cost is always the same. In addition, under current law, with the application of Bill-and-Keep, CenturyTel does not incur any charge for termination.⁶⁵ Level 3 does not regard CenturyTel's claim to entitlement of additional compensation as legitimate.

Level 3 reasoned that the language in the FCC's *ISP Remand Order*, footnote no. 149, does not indicate that the FCC intended to treat ISP-bound traffic differently for all purposes.⁶⁶ Indeed, Level 3 argued, had the FCC intended to remove ISP-bound traffic from existing interconnection agreement terms it would have established alternative interconnection rules for this purpose just as it established alternative intercarrier compensation rules. Further Level 3 argued that CenturyTel's effort to collect originating access charges is explicitly prohibited by 47 C.F.R. §51.703(b) which states, "a LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC network."⁶⁷

Level 3 implored the arbitrators to reject CenturyTel's position because it encourages a discriminatory result, noting that enhanced service providers (ESPs), of which ISPs are a subset, often purchase local service from the ILECs and the ILECs do not establish separate networks to handle ISP-bound calls from ESP customers. Instead, Level 3 asserted, the ILECs route ISP-bound and local traffic over the same network facilities and they do this as well for other ILECs with no evidence of separate interconnection agreements being involved. By demanding that Level 3 adopt a separate and more expensive approach to handle its ISP-bound traffic a disservice is done to Level 3 and future CLECs routing ISP-bound traffic. In the process, Level 3 concluded, CenturyTel grants itself and other ILECs a preference in the exchange of ISP-bound traffic.

Level 3 interpreted the *Direct Testimonies* on behalf of CenturyTel to be largely focused upon the third DPL issue regarding FX and Virtual NXX. This issue concerns the dispute over what is appropriate intercarrier compensation when a CenturyTel customer makes a call (usually PC modem dialed) to a Level 3 end user ISP and that ISP does not have a physical presence in

⁶⁵ *Petition of Level 3 for Arbitration with CenturyTel*, August 7, 2002, pp. 14-18.

⁶⁶ *Direct Testimony of Michelle Krezek on Behalf of Level 3 Communications, L.L.C.*, October 10, 2002, p.7.

the CenturyTel customer's local traffic calling scope. CenturyTel maintained that Level 3's service was analogous to interexchange "800 service" and Level 3 argued that the provision of service to a customer outside of the local rate center has been commonly provided by ILECs.⁶⁸ Level 3 argued that the commission's decision in Docket No. 24015, which "refused to treat AT&T's proposed service as FX"⁶⁹, did not apply to Level 3 because Level 3 did not seek reciprocal compensation with CenturyTel and therefore the commission's reasoning in Docket No. 24015 related to regulatory arbitrage did not apply in this arbitration.

Finally, Level 3 concluded that CenturyTel's proposal to apply per-minute origination charges to the ISP-bound traffic was discriminatory and anti-competitive. Level 3 argued that bill and keep is the appropriate compensation methodology for Level 3's ISP traffic pursuant to the FCC's *ISP Order on Remand*. Level 3 noted that ISP-bound traffic that originates in CenturyTel's service area and is routed to another ILEC's service area is not treated as access traffic because the traffic is simply passed off to the other ILEC.⁷⁰ Level 3 concluded that CenturyTel must apply the same conditions to Level 3's ISP-bound traffic.

Level 3 also asserted that CenturyTel was attempting to create a "distinction without a difference with respect to Level 3's service."⁷¹ Level 3 claimed that its service is in fact a competitive response to CenturyTel and other ILEC FX services. Level 3 maintained that the only difference between its proposed service and that of the ILECs is a different technology for the offering of the service and the fact that Level 3's customers (ISPs) are more distantly located. Otherwise, Level 3 concluded, the functionality of the service is the same as that provided by the ILECs for ISP-bound traffic. Level 3 regarded CenturyTel's proposal to apply access charges to Level 3's service as punitive and not related to actual costs.

Level 3 suggested that several mechanisms already exist which provide similar service to end users, such as remote Call Forwarding (RCF), Extended Calling Service (ECS), Extended Area Service (EAS), Extended Local Calling (ELC), Foreign Exchange (FX) and others, that do

⁶⁷ *Id.* at p. 8 and footnote 4.

⁶⁸ *Id.* at p.15

⁶⁹ *Id.* at p.20

⁷⁰ *Id.* at 32-33.

not "rate," or produce toll charges for, the end user. The customer's billing is not the issue, argued Level 3, and CenturyTel does not incur any additional costs for originating the customer's call, rather Level 3 bears the additional cost, if any, in transporting the call to its distant, ISP, customer.⁷² Because CenturyTel merely transports the call to the same POI as any local call, CenturyTel does not bear any responsibility or cost associated with FX or FX-type service. Level 3 intends to locate POIs in each CenturyTel calling area; therefore, CenturyTel will have no task, perform no function, and have no expense beyond transporting the call to the POI.⁷³

Level 3 also discussed in further detail similar offerings of Virtual NXX service being made by other ILECs and by CenturyTel. Level 3 noted that CenturyTel does not appear to demand that other carriers identify the physical locations of their customers nor does it even inquire if those customers are ISPs.⁷⁴ Level 3 concluded that CenturyTel's concern about Level 3's service offering was also applicable to the previously mentioned services of other ILECs, and of other retail services (like RCF and FX) and that CenturyTel's focus of effort in opposing Level 3 is clearly discriminatory. In addition, CenturyTel does not pay access charges for its own services to other ILECs, nor should it, reasoned Level 3, because these toll free services benefit the end users. Despite the fact that access charges were developed with the intention of keeping local rates low, the access rate structure has hampered the development of competition, Level 3 therefore concluded that CenturyTel's proposed approach for ISP traffic, if applied to Level 3, will result in reduced earnings for Level 3, additional charges for Level 3's ISP customers, and, ultimately, increased costs and reduced choices for the consumers.⁷⁵

Level 3 also responded to CenturyTel's arguments regarding segregation of local traffic from ISP-bound traffic, its definition of local traffic, its position with regard to Virtual NXX services and its refusal to define "bill-and-keep".

⁷¹ *Direct Testimony of Timothy J. Gates on Behalf of Level 3 Communications, L.L.C.*, October 10, 2002, p.6.

⁷² *Reply Testimony of Timothy J. Gates on Behalf of Level 3 Communications, L.L.C.*, October 16, 2002, pp. 5-6.

⁷³ *Id.* at 5.

⁷⁴ *Id.* at 8.

⁷⁵ *Id.* at 11-12.

Level 3's *Post Hearing Brief*, reiterated its two primary points with regard to this issue; first, that the FCC bans origination charges applied to ISP-bound services by virtue of 47 C.F.R. §51.701(b)(1) and §51.703(b) definitions, and second, that Level 3's service is functionally equivalent to ILEC FX and FX-type services and should be treated in a like manner. With regard to this second point, Level 3 asserted that the FCC's intercarrier compensation rules ban origination charges and exempt this traffic from access charges.⁷⁶ Level 3 also addressed CenturyTel's argument that the service it proposes resembles the AT&T proposal in Docket No. 24015 and denies this claim because Level 3 does not seek reciprocal compensation, as AT&T did for its service offering, and therefore the concern of regulatory arbitrage addressed in that arbitration do not apply.⁷⁷ Level 3 concluded in its *Brief* that CLECs should not be confined to the same ILEC network architecture or ILEC serving areas, but allowed to develop innovative approaches.⁷⁸ To conclude, as CenturyTel argues, that the Level 3 offering differs from ILEC similar FX offerings and therefore does not qualify for the same rate treatment, would result in discrimination against the CLECs and, in Level 3's opinion, hamper competition by enforcing outdated regulatory constructs.

Level 3's *Post Hearing Reply Brief*, December 13, 2002, re-stated its positions regarding this issue. Level 3 emphasized that the calls placed to its ISP customers are locally dialed calls. Therefore, CenturyTel's arguments regarding comparisons to toll calls are immaterial. Further, Level 3 asserted that it is seeking the commission's acknowledgment of the FCC's decision to adopt bill and keep as the appropriate compensation mechanism for these calls on the basis of the fact that the calls are locally dialed ISP-bound traffic. Level 3 argued that CenturyTel confuses the issue by asserting that the commission is making an independent decision regarding the rate treatment for ISP-bound traffic rather than applying the existing FCC decisions to this traffic.⁷⁹ Level 3 refuted the CenturyTel claim that FX service was a "two-way service" by noting that the CenturyTel witness has admitted that FX service was not always two-way in nature and that the

⁷⁶ *Level 3 Post Hearing Brief*, pp. 27-29.

⁷⁷ *Id.* at 34.

⁷⁸ *Id.* at 36.

⁷⁹ *Level 3 Post Hearing Reply Brief*, p. 23.

arbitrators in Docket No. 24015 had concluded that FX service was "primarily characterized by high volumes of in-bound calls."⁸⁰

2. CenturyTel's Position

CenturyTel asserted that Virtual NXX, FX-type, calls should be properly classified as interexchange and subject to originating access charges. Likewise, CenturyTel claimed that other state commissions had concluded that access charges were being avoided. CenturyTel described Level 3's service as the assignation of three-digit prefixes, associated with CenturyTel's local calling areas, to its ISP customers, who have no physical presence in CenturyTel's area. CenturyTel stated that the distinction avoided by Level 3 regarding the end to end nature of the communication is the very issue regarded as more significant by the courts and FCC than the type of facilities employed to complete the communication.⁸¹

CenturyTel equated Level 3's proposed service as functionally equivalent to 800 service. In exchange for the ability to receive calls without incurring costs to the callers, the 800 service customer pays a usage fee to the interexchange carrier (IXC) who then pays access charges to the ILEC for access to their network. CenturyTel concluded that to permit Level 3's FX-type/Virtual NXX proposal would allow Level 3 to provide its ISP customers with 800 service without requiring the payment of necessary access charges. CenturyTel noted finally that it is unclear where Level 3 intends to interconnect with the CenturyTel network facilities and therefore it is difficult to determine which costs incurred by CenturyTel might be left unrecovered. In its opinion, Level 3's assertion that there is no additional cost to CenturyTel to transport and switch its end user calls to the Level 3 POI is premature at best.⁸²

CenturyTel reasoned that Level 3's service is the same as 800 Service because Level 3 acquires a local exchange number, which customers then dial to reach an ISP located some distance away from the local exchange without incurring toll or long distance charges. The call proceeds to the local CenturyTel end office, where it is switched to an IXC facility, from there

⁸⁰ *Id.* at 22 re: Tr.574:18-22, 575:9-11, 576:10-21 and Docket No. 24015, *Revised Arbitration Award* p. 56 n.289.

⁸¹ *CenturyTel Response to Level 3's Petition* at 17.

the call will be switched to Level 3's switch, located in Dallas, and, finally, from Level 3's switch, the call is terminated to the ISP who is Level 3's customer. CenturyTel advised it does not believe that Level 3 will have a local switch or end office presence in the CenturyTel local service areas.⁸³ CenturyTel noted that the traffic is not local, does not originate and terminate within the same local calling area, and that the methodology does not meet the definition of FX Service, which requires a dedicated connection between the customer's premise (ISP) in one exchange and the (CenturyTel) end office in the foreign exchange.⁸⁴ The fact that the Level 3 service is designed to be inward calling only makes the service most closely resemble 800 Service because FX service is generally a two-way service, in the opinion of CenturyTel.

Therefore, CenturyTel concluded that Level 3 has mischaracterized its service offering as "FX-like" to avoid paying CenturyTel rightful compensation for its provision of the switching and loop facilities at the "Open End."⁸⁵ Level 3's service will therefore compete with traditional 800 Service without paying appropriate access charges, a discriminatory outcome, in CenturyTel's opinion.⁸⁶ CenturyTel also noted that the fact that 800 Service incurs access charges does not result in companies using such service applying toll charges to the end users that contact them.

In addition, CenturyTel reiterated its arguments and again noted that the service proposed by Level 3 does not meet the FCC definition of FX service because there is no dedicated connection between the subscriber's premises and the distant end office.⁸⁷ CenturyTel cited the *Revised Arbitration Award* in Docket No. 24015, wherein the arbitrators expressed concern over rate arbitrage resulting from the assignment of NPA-NXX with no correlation to the geographic location of the party.⁸⁸ The *Revised Arbitration Award* noted that the Commission had rejected a

⁸² *Id.* at 19-20.

⁸³ *Direct Testimony of Susan W. Smith on Behalf of CenturyTel of Lake Dallas, Inc., and CenturyTel of San Marcos, Inc.*, October 10, 2002, pp. 8-10.

⁸⁴ *Id.* at pp. 11-12.

⁸⁵ *Id.* at pp. 14-15

⁸⁶ *Id.* at pp. 16-17.

⁸⁷ *Id.* at pp. 11.

⁸⁸ *Id.* at pp. 16

proposal in Docket No. 21982⁸⁹ because of its effect upon the ILEC revenue stream and avoidance of access charges.⁹⁰ CenturyTel concluded that a call cannot be local when its termination is not local, and that treating Level 3's ISP-bound traffic as Local traffic will result in discriminatory treatment against other carriers and a negative revenue impact upon CenturyTel.

CenturyTel also disagreed with Level 3's argument that Level 3's service was similar to ILEC FX, RCF, ELCS, etc..., services and asserted instead that the service most closely resembles that of IXCs, in particular, 800 Service. CenturyTel re-affirmed its position that the issue at hand is entirely dial up ISP-bound traffic and disagreed with the Level 3 characterizations regarding voice and internet telephony policy implications, stating that Level 3 has not deployed voice services or local services and that in any case the presumption of the end user's modem being located within the same local calling area as the ISP would not apply, therefore the traffic is interexchange in nature.⁹¹ CenturyTel asserted that the FCC's *ISP Remand Order* merely added "local" ISP-bound traffic to its existing authority under FTA §201 and determined that bill-and keep was the appropriate compensation mechanism for such traffic.⁹² CenturyTel claimed that the FCC had not modified the access charge regime for ISP-bound traffic that originates and terminates outside of a single calling area. Whether Level 3's traffic falls under the definition of exchange access or information access traffic as defined in §251(g), CenturyTel concluded the local interconnection requirements of §251 are not applicable, because either way the Level 3 traffic falls into §201 jurisdiction.⁹³

CenturyTel concentrated upon the definition of Level 3's traffic, a comparison of that traffic with existing traffic modes, and the effect of Level 3's proposal upon the public switched network. CenturyTel argued that Level 3's proposed VNXX service avoids compensation to CenturyTel for the use of its local network unlike any other existing service that transmits a call

⁸⁹ Docket No. 21987, *Proceeding to Examine Reciprocal Compensation Pursuant to Sect. 252 of the Federal Telecommunications Act of 1996*.

⁹⁰ Docket No. 24015, *Revised Arbitration Award*, August 28, 2002, p. 36.

⁹¹ *Reply Testimony of Wesley Robinson on Behalf of CenturyTel of Lake Dallas, Inc., and CenturyTel of San Marcos, Inc.*, filed October 16, 2002, pages 6-8.

⁹² *Id.* at 20.

⁹³ *Id.* at 21.

from the local network to an area outside of the local serving area⁹⁴. CenturyTel compared the Level 3 proposed traffic scenario with 800 service, FX service, and ECS (expanded calling services) and concluded that there was no difference in outcome among these traffic servicing provisions aside from the avoidance of compensation in Level 3's proposal.⁹⁵ CenturyTel asserted that it is dependent upon access revenues to build and maintain the local network and that the Level 3 proposal will result in a shift in existing regulatory policy such that local end users in the CenturyTel network will suffer the consequences.⁹⁶

CenturyTel's *Post Hearing Brief*, November 27, 2002, emphasized the importance of a decision regarding appropriate compensation for the ISP-bound traffic Level 3 proposes. CenturyTel asserted that bill-and-keep compensation is not appropriate because it does not adequately compensate the company and that appropriate compensation for this traffic is solely under FCC jurisdiction pursuant to the terms of the *ISP Remand Order*. CenturyTel surmised that the determination of whether the Level 3 traffic is closer in analogy to FX or 800 service will determine the appropriate compensation. CenturyTel asserted that §251(g) of the FTA indicates that the nature of the interconnection determines compensation. Following the logic of Level 3 would result in all traffic of an ISP-bound nature being billed via bill-and-keep and CenturyTel argued this is clearly undesirable.

CenturyTel interpreted Level 3's position as one in which by arguing that its traffic was comparable to FX traffic it would then be able to classify the traffic as local which in turn would subject it to bill-and-keep provisions pursuant to the recent *FCC Order*.⁹⁷ CenturyTel argued that the definition of toll service in 47 C.F.R. §51.5, "telephone service between stations in different exchange areas for which there is a separate charge not included in contracts with subscribers for exchange service", fits the proposal for Level 3 traffic. CenturyTel asserted that Level 3's claim that its service is FX accomplishes one end, the avoidance of applicable charges.⁹⁸

⁹⁴ *Id.* at 7-8.

⁹⁵ *Reply Testimony of Ms. Smith on Behalf of CenturyTel of Lake Dallas, Inc., and CenturyTel of San Marcos, Inc.*, October 16, 2002, p. 9-13.

⁹⁶ *Id.* at 9-13.

⁹⁷ *CenturyTel Post Hearing Brief* pp. 18-19.

⁹⁸ *Id.* at 20.

CenturyTel noted that an FX service requires the LEC to be compensated for the "open end" of the circuit and that Level 3 has not offered to do this despite the fact that it insists its service is FX in nature.⁹⁹ Finally, in its *Brief*, CenturyTel commented again that the service offered by Level 3 is not comparable to that offered by AT&T in Docket No. 24015. CenturyTel asserted that the difference between Level 3's service in this arbitration and AT&T's service in the arbitration in Docket 24015 is that AT&T offered local service to a customer in one exchange that reached a customer in another distant exchange. In this docket, in the opinion of CenturyTel, Level 3's service is strictly an inward-bound, interexchange, toll-free calling service, differentiated from 800 service only in that it uses a seven digit number instead of a ten digit number and it makes its data dip at the Level 3 switch rather than within the public network switch.¹⁰⁰

In its *Post-Hearing Reply Brief of December 13, 2002*, CenturyTel summarized its position and emphasized its previous arguments. First, CenturyTel stated that Level 3's proposed service is functionally equivalent to 800 service and that docket No. 24015 had distinguished between FX type services and 800 services. Therefore, Level 3's service offering does not meet the Docket No. 24015 standard. On this point, CenturyTel noted that the Award in Docket No. 24015 relied upon the definition of FX service contained in Subst. R. §26.5(86)¹⁰¹ and also stated that "FX does not in and of itself facilitate the provisioning of toll calls beyond the two affected exchange service areas."¹⁰²

CenturyTel re-stated its conclusion that if Level 3 insists upon its service being FX in nature then the usual special access/private line charges and usage based charges should apply. Finally, CenturyTel addressed Level 3's accusation that opposition to its service offering is discriminatory and thwarts innovation. CenturyTel stated that the Level 3 service, "Connect Modem", will consist of VNXXs and leased facilities. Therefore, in CenturyTel's assessment, Level 3's service is not innovative.

⁹⁹ *Id.* at 21, re: Tr. at pp 507-509.

¹⁰⁰ *Id.* at 21-22.

¹⁰¹ "exchange service furnished by means of a circuit connecting a customer's station to a primary service office of another exchange"

¹⁰² *Post Hearing Reply Brief of CenturyTel of Lake Dallas, Inc., and CenturyTel of San Marcos, Inc.*, p. 14.

Level 3's claim that CenturyTel is operating its own ISP "roaming service" without payment of access charges and, therefore, discriminating against Level 3 by proposing to impose access charges in this instance is completely unfounded in CenturyTel's opinion.¹⁰³ CenturyTel noted that no showing has been made that the affiliate CenturyTel offering ISP-bound services does not pay access charges to the underlying LECs.

CenturyTel maintained that it seeks consistent treatment of like carriers, thereby preserving the integrity and stability of its tariffs, whether appropriate charges are for interexchange traffic (access charges) or FX type service (FX related charges). Further, Level 3 has never shown that the obligation to pay such charges would render its services non-compensatory, therefore there is no evidence that appropriate application of charges would prevent the service from being offered.¹⁰⁴

3. Arbitrators' Decision

The Arbitrators refer to the ISP Remand Order and the FCC's exception to the interim bill-and-keep compensation provisions developed therein. In its Order the FCC noted that the Eighth Circuit observed that pre-existing regulatory treatments of services (access charges) were not expected to move to a cost based pricing structure immediately and that those services enumerated under §251(g) are therefore "carved out" from the purview of §251(b).¹⁰⁵ The FCC further reasoned, from this observation of the Eighth Circuit, that services equivalent to two LECs providing access service to an ISP's end-users fall within the §251(g) standards.¹⁰⁶ Finally, the FCC stated that such services were subject to FCC or state jurisdiction whether those obligations implicated pricing policies or reciprocal compensation.¹⁰⁷ This latter conclusion is pertinent to the Arbitration at hand.

The Arbitrators do not find persuasive Level 3's argument that 47 C.F.R. §51.703(b) prohibits CenturyTel from collecting originating access charges for ISP-bound services in all

¹⁰³ *Id.* at 24.

¹⁰⁴ *Id.* at 24.

¹⁰⁵ *ISP Remand Order*, ¶38, re: *Comptel*, 117 F 3d at 1073.

¹⁰⁶ *Id.* at ¶39.

circumstances. The Arbitrators believe that, although ISP traffic has not been defined as access traffic, it has now been defined by the FCC as interstate traffic. Though it would be easier for the parties and the Arbitrators if all aspects of the terms, conditions, and rates for ISP-bound service had been decided and made available by the FCC, the reality is that this is an area which is being defined within the marketplace and through laborious policy decisions in both jurisdictions.

As noted by CenturyTel, it is unclear where Level 3 intends to interconnect with the CenturyTel network facilities and, therefore, it is difficult to determine which costs incurred by CenturyTel might be left un-recovered. Level 3's assertion that there is no additional cost to CenturyTel to transport and switch its end-user calls to the Level 3 POI is indeed premature, as noted by CenturyTel. However, based upon the information provided in this arbitration, Level 3 proposes a service, inter-exchange and possibly interstate in nature, employing an FX style architecture, which evades existing regulatory treatment with regard to jurisdictional compensation.

As posited by Level 3, the proposed service most closely resembles that of FX service. It allows ISP end-user customers to avoid payment of toll charges. Therefore, special access charges applicable to other FX customers appear legitimate.

As discussed during the Hearing, FX customers typically pay originating LEC interoffice channel mileage, a local channel charge and a local minute of usage charge.¹⁰⁸ Between the originating LEC end office and the terminating LEC end office, the FX customer typically pays an IXC for interoffice channel mileage and the IXC makes payment to the LEC for appropriate tariffed rates for interconnection to its network.

Level 3 contends that the ISP-bound nature of its traffic serves alone to exempt its service offering from jurisdictional compensation and, in the opinion of the Arbitrators, this view constitutes an over-broad interpretation of the FCC's ISP Remand Order. The FCC's Order did not recharacterize interexchange ISP-bound traffic to be free from intercarrier compensation despite originating and terminating in different local exchange service area. The FCC sought to eliminate the incentive for CLECs to cater strictly to such ISP-bound traffic, reaping profits from

¹⁰⁷ *Id.* at ¶39.

the LEC and the ISP customer, and subsidizing internet usage at the expense of the general ratepayer. Clearly, to accept Level 3's position, that it is exempt from the usual inter-exchange compensation of either special access or switched access charges, results in the same imbalance that the FCC sought to correct in its Order.

The Arbitrators conclude that the proper treatment of Foreign Exchange (FX) or "Virtual NXX" traffic for inter-carrier compensation purposes is that afforded all FX customers, the application of appropriate tariffed charges for the interconnection. To do otherwise discriminates against the balance of FX customers, including LEC to LEC FX arrangements, and lays aside existing regulatory compensation prematurely.

Level 3 may meet this decision's requirement by either purchasing FX service from CenturyTel's (and any other affected carrier's) tariff, or by negotiating special access arrangements with CenturyTel (and any other affected carrier) as required to establish its service.

D. DPL Issue No. 4: How should the parties define Bill-and-Keep compensation to implement the FCC's Order on Remand?

1. Level 3's Position

Level 3 proposes the adoption of the FCC's definition of bill-and-keep as it appears in the *ISP Remand Order*. According to this definition, each party is responsible for looking to its own end users for recovery of costs. In addition, Level 3 proposed that ISP-bound traffic be treated in accordance with the *ISP Remand Order* and language appropriate to this approach be adopted in the interconnection agreement at Article V, Section 3.2.

Level 3 also opines that CenturyTel's IATA imposes unspecified originating usage charges on ISP-bound calls, thus violating the FCC's directive in the *ISP Remand Order* to apply bill-and-keep to such calls. In Level 3's analysis, the IATA proposed by CenturyTel is

¹⁰⁸ Tr. at 700 at 9-25.

discriminatory because CenturyTel serves its own ISP customers using local service tariff terms and rates.¹⁰⁹

Level 3's *Post Hearing Brief and Reply Brief* argued that CenturyTel's position regarding the application of bill-and-keep billing methodology for ISP-bound traffic is actually and argument suited to Issues 2 and 3 of this arbitration. CenturyTel's argument, that the location of the ISP modem banks is critical, is absurd in Level 3's estimation, because if the location of the modem banks does not matter with regard to reciprocal compensation and jurisdictional issues then an argument that it matters with regard to CenturyTel's compensation does not follow.¹¹⁰ Similarly, CenturyTel's argument ignores the fact that the FCC determined that the jurisdiction of the traffic is dependent upon the fact that the traffic is destined for the internet not where the modem banks are placed. In its *Reply* Level 3 urged the arbitrators to adopt its language for Section 3.2.2 (Bill-and-Keep), of the interconnection agreement but stated that should the arbitrators determine that the additional language related to examples of traffic other than local traffic, is disputable that the abbreviated revision eliminating these items is acceptable.¹¹¹

2. CenturyTel's Position

CenturyTel maintained that the *ISP Remand Order* only addresses the termination of calls made to an ISP within the customer's local calling area. CenturyTel cites to the *Remand Order* ¶13 which acknowledges that the FCC sought to answer the question of "whether reciprocal compensation obligations apply to the delivery of calls from one LEC end-user customer to an ISP in the same local calling area that is served by a competing LEC". CenturyTel noted that the D.C. Circuit interpreted this as applying only to calls made to ISPs located within the caller's local calling area. Therefore, CenturyTel reasons that neither the FCC nor the D.C. Circuit contemplated ISP-bound traffic obligations directed to an ISP located outside of the local calling area as would apply to all of Level 3's traffic and bill-and keep does not apply.

¹⁰⁹ *Id.* at 6.

¹¹⁰ *Post Hearing Brief of Level 3 Communications, L.L.C.* at 47.

¹¹¹ *Id.* at 26.

CenturyTel asserted that it did not object to adoption of the definition for bill-and keep proposed by Level 3 provided that the term "Local" is inserted in the first sentence between the words "terminating" and "traffic."

In its *Post Hearing Brief* and *Reply Brief* CenturyTel re-asserted its position that the *ISP Remand Order* imposes bill-and-keep for the termination of calls made to an ISP located within the local calling area. CenturyTel argued that the language proposed by Level 3 would exclude ISP-bound traffic from any imbalance calculation, and extend bill-and-keep to "internetwork facilities" (an undefined term) access traffic, and wireless traffic although none of these services have been raised as issues in this arbitration.¹¹²

In its *Reply* CenturyTel disagreed with Level 3's assertion that the proposed definition of bill-and-keep is that used by the FCC's *ISP Remand Order* at footnote 6. However, CenturyTel did agree with Level 3's position that the jurisdictional nature of the ISP-bound traffic is determined by the fact that the internet is the destination of the traffic.¹¹³ CenturyTel asserted that this is the core issue upon which the FCC has based the assertion of its authority over ISP-bound traffic and therefore the FCC is the proper authority to determine whether bill-and-keep applies when a carrier interconnects to provide an interexchange service to ISPs. Again, CenturyTel concluded that the commission should decline to address this issue, as it did in its decision in the Award for Docket No. 24015.

3. Arbitrators' Decision

In the context of this arbitration and the Arbitrators' previous Issue decisions, the Arbitrators conclude that the FCC's bill-and-keep provisions for ISP-bound traffic do not apply to a service offering such as that proposed by Level 3. The Arbitrators conclude that Level 3's proposed traffic will not be local ISP-bound traffic because it does not originate and terminate within the local exchange service area. The FCC's concern regarding inappropriate reciprocal compensation measures does not apply.

¹¹² *Post Hearing Brief of CenturyTel of Lake Dallas, Inc., and CenturyTel of San Marcos, Inc.*, pp. 22-23.

¹¹³ *Level 3 Communications, L.L.C. Brief* p. 51.

As noted in the Revised Arbitration Award, in Docket No. 24015, FX service is a value-added service offered to customers who are interested in creating a "local" presence in a foreign exchange. The Arbitrators in that docket considered a value-added service to be a service that a customer pays a premium for in order to derive additional economic or other benefits. From the perspective of the end-user located in the foreign exchange, the FX customer appears to be "local" and all calls made to that customer are treated as local. While FX service has traditionally been offered by LECs for many decades,¹¹⁴ the evidence in the record in Docket No. 24015 indicated that the competitive market for FX service is in its infancy and will grow in the future.¹¹⁵ The Arbitrators in Docket No. 24015 found that it was critical that the wholesale compensation mechanism for FX service support the development of an efficient and viable market so that FX customers will receive accurate retail price signals from carriers competing on the basis of the quality and efficiency of the services they provide. The current Arbitrators concur with this judgment.

The Arbitrators in Docket No. 24015 also noted that the primary focus of the ISP Remand Order was to appropriately classify and develop a compensation mechanism for ISP-bound traffic. In that context, the FCC had deleted references to "local" traffic. However, the Arbitrators in Docket No. 24015 concluded, and the current Arbitrators agree, that the FCC did not abandon the concept of a local call or a local calling area, nor did it pre-empt state commissions from defining a local calling area. In fact, in explaining the lack of an analogy between ISP-bound traffic and local calls, the FCC affirmed that local calls are communication between two parties that remain squarely in the same local calling area.¹¹⁶ The Arbitrators also note that the ISP Remand Order did not invalidate this Commission's holding in Docket No. 21982 that the geographic location of the end user, rather than the assignment of an NPA-NXX, is the appropriate standard for defining a local calling area. Like the Arbitrators in Docket No. 24015, we conclude that an important factor in the classification of FX service for purposes of compensation is the geographic location of the end user rather than the network costs of the service. As a result of their analysis in Docket No. 24015, the Arbitrators concluded

¹¹⁴ SWBT's FX tariffs date back to 1919 (Docket No. 24015 Tr. at 107 (July 2, 2001))

¹¹⁵ Docket No. 24015, Tr. at 333-338 and 650-651 (July 2, 2001)

¹¹⁶ ISP Remand Order ¶63.

that LECs must segregate ISP-bound traffic according to jurisdiction for the purposes of compensation.

The Arbitrators here conclude that the definition of bill-and-keep should include the term "local" before the word "traffic" and that bill-and-keep provisions should apply to any Level 3 ISP-bound traffic where the Level 3 ISP customer's presence and the ISP customer's customer are both in the local exchange calling area.

II. CONCLUSION

The Arbitrators conclude that the decisions outlined in the Award as well as any conditions imposed on the parties by these decisions, meet the requirements of FTA § 251 and any applicable regulations prescribed by the FCC pursuant to FTA § 251.

III. POST-AWARD PROCEDURAL SCHEDULE

As requested by the parties, the Arbitrators have made determinations regarding the proper definition of Level 3's ISP-bound traffic, whether it required a separate interconnection agreement, appropriate inter-carrier compensation for this traffic and the proper definitions of local service and bill-and-keep compensation pursuant to the FCC's *ISP Remand Order*.

Parties proposed language in the Revised DPL submitted on October 15, 2002, and the arbitrators have developed specific language, presented in the Final Arbitration DPL attached as Attachment B, to address each issue resolved in this Award.

However, Level 3 has not concluded the network design of its interconnection with CenturyTel. To ensure that the policy decisions made herein are appropriately incorporated into the parties' interconnection agreements, Level 3 is directed to develop a network design that reflects the contract language approved in this Award, and the parties are to submit their final interconnection agreement, with clarification of any language that differs from that previously reviewed by the Arbitrators, to the Arbitrators for final review. To the extent that such language is not agreed-upon, the Arbitrators will make language recommendations consistent with the

policy decisions contained herein. The table below sets forth the procedural schedule that will be in effect unless and until superceded:

ACTIVITY	DATE
AWARD FILED	March 12, 2003
DEADLINE FOR FILING OF: (1) INTERCONNECTION AGREEMENT LANGUAGE, OR (2) DISPUTED CONTRACT LANGUAGE	April 9, 2003

Additional procedural deadlines will be established as required when the parties make their interconnection agreement filing on April 9, 2003.

SIGNED AT AUSTIN, TEXAS the 11th day of March 2004.

FTA §251 PANEL



ROGER STEWART
ARBITRATOR



JANIS ERVIN
ARBITRATOR

Staff team member:
Katherine Farrell

**ATTACHMENT A
BACKGROUND AND REFERENCE INFORMATION****I. JURISDICTION**

If an incumbent local exchange carrier (ILEC) and a competitive local exchange carrier (CLEC) cannot successfully negotiate rates, terms and conditions in an interconnection agreement, pursuant to § 252 of the federal Telecommunications Act of 1996 (FTA),¹¹⁷ specifically FTA § 252(b)(1), provides that either of the negotiating parties “may petition a State commission to arbitrate any open issues.” The Commission is a state regulatory body responsible for arbitrating interconnection agreements approved pursuant to the FTA.

II. PROCEDURAL HISTORY

On August 8, 2002, Level 3 filed a petition for arbitration, pursuant to FTA 252(b), against CenturyTel requesting resolution of numerous issues related to ISP-Bound FX-Type traffic.

A prehearing conference was held on September 6, 2002 where the parties jointly proposed a procedural schedule. Parties agreed to file initial briefs on September 23, 2002 regarding their first issue, whether ISP-bound traffic should be handled by a separate agreement. Discovery was initiated on September 13, 2002 and concluded on September 27, 2002. On October 1, 2002, Parties requested an extension of the original September 30, 2002 deadline for filing an initial joint Decision Point List (DPL). On October 2, 2002 Order No. 3, *Extending Decision Point List Deadline*, granted the parties’ request and extended the deadline for the DPL to October 7, 2002. On October 7, 2002, the parties filed a joint DPL. On October 15, 2002, parties filed a further negotiated joint DPL (hereinafter referred to as the *Final DPL*).

Level 3’s *Motion for a Protective Order* was filed on September 24, 2002. Level 3 advised that Parties had agreed to use the Protective Order in Docket No. 25188, *Petition of El Paso Networks, LLC for Arbitration of an Interconnection Agreement with Southwestern Bell Telephone Company*, for the review of responses to requests for information. On October 15,

¹¹⁷ Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 15 and 47 U.S.C.) (FTA).

Order No. 4, *Issuing Protective Order and Requiring Responses to Requests for Information be Filed with the Commission*, was issued, formally adopting the Protective Order.

Direct testimony was filed on October 11, 2002 and rebuttal testimony was filed on October 16, 2002. The hearing on the merits was held on October 21, October 22, and October 23, 2002.

Parties filed a letter on November 4, 2002, requesting an extension of the time limits established in FTA §252(b)(4)(C) for this proceeding and stating that they would file statements in which they agreed not to seek reversal of any award pursuant to FTA §252(b)(4)(C) should the Arbitrators grant their request. Parties proposed that Initial Briefs be due on November 27, 2002, and Reply Briefs be due on December 13, 2002 and that the deadline for the final decision in this arbitration be extended accordingly. On November 8, 2002, Order No. 5, *Extending Briefing Schedule and Requiring Statement Addressing FTA §252(b)(4)(c) Deadlines*, was issued.

On November 13, 2002, both Parties filed Statements regarding the extension of the schedule and the impact of FTA §252(b)(4)(c) upon any subsequent request for reversal that Parties might seek based upon the statute's established time line. On November 27, 2002, Initial Post Hearing Briefs were received and on December 13, 2002, Post Hearing Reply Briefs were received.

III. RELEVANT STATE AND FEDERAL PROCEEDINGS

A. Relevant Commission Decisions

1. *Mega-Arbitrations*

The FTA became effective in February 1996. Soon thereafter, several proceedings, collectively referred to as the Mega-Arbitrations, were initiated and consolidated for the purpose of arbitrating the first interconnection agreements in Texas under the new federal statute. A focal issue in these proceedings revolved around establishing "reciprocal compensation" rates. "Reciprocal compensation" refers to the statutorily mandated arrangement between two carriers by which each carrier receives compensation for the transport and termination on its network

facilities of telecommunications traffic that originates on the network facilities of the other carrier.¹¹⁸

In November 1996, the Commission issued the First Mega-Arbitration Award in Docket No. 16189¹¹⁹ which established inter-carrier compensation rates, on an interim basis, for end-office switching, tandem switching, and inter-office transport. The reciprocal compensation rates adopted in the First Mega-Arbitration Award applied to "calls that originate and terminate within the mandatory single- or multi-exchange local calling area of SWBT, including the mandatory Extended Area Service (EAS) areas served by SWBT."¹²⁰ During the first nine months after the date upon which the first commercial call terminated between SWBT and a CLEC, however, the Commission designated "bill-and-keep"¹²¹ as the arrangement by which reciprocal compensation would be accomplished.

The Second Mega-Arbitration Award in Docket No. 16189¹²² issued December 1997, approved cost studies for SWBT and established permanent inter-carrier compensation rates for SWBT interconnection agreements.

Pursuant to FTA § 252(i), many CLECs subsequently opted into the reciprocal compensation provisions in the interconnection agreements approved in the Mega-Arbitration proceedings. Neither the First nor Second Mega-Arbitration Award, or the interconnection agreements resulting from those proceedings, specifically addressed the issue of whether a call bound for an Internet service provider (ISP) is subject to reciprocal compensation. In addition, neither Award addressed the definition of ISP-bound traffic that does not terminate in the local

¹¹⁸ See FTA §§ 251(b)(5), 252(d)(2). The FCC has construed the reciprocal compensation requirement in the FTA to apply to *local* telecommunications traffic only. 47 C.F.R. § 51.701(e) (1998).

¹¹⁹ *Petition of MFS Communications Company, Inc. for Arbitration of Pricing of Unbundled Loops Agreement Between MFS Communications Company, Inc. and Southwestern Bell Telephone Company*, Docket No. 16189, *et al*, Award (Nov. 8, 1996) (First Mega-Arbitration Award).

¹²⁰ *Id.* ¶58.

¹²¹ FTA §252(d)(2)(B)(i) permits "arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements)."

¹²² *Petition of MFS Communications Company, Inc. for Arbitration of Pricing of Unbundled Loops Agreement Between MFS Communications Company, Inc. and Southwestern Bell Telephone Company*, Docket No. 16189, *et al*, Award (Dec. 19, 1997) (Second Mega-Arbitration Award).

exchange area but is routed to the CLEC for transport to an ISP located outside of the local exchange area.

2. Docket No. 18082

The reciprocal compensation provisions in the interconnection agreements approved in the Mega-Arbitration proceedings were initially disputed in Docket No. 18082.¹²³ In October 1997, Time Warner Communications of Austin L.P., Time Warner Communications of Houston, L.P., and FIBRcom (collectively, TW Comm) filed a complaint pursuant to Subchapter Q of the Commission's procedural rules, alleging that SWBT had breached its interconnection agreement with TW Comm.

Specifically, the controversy centered on compensation for calls connecting SWBT customers to TW Comm customers that are ISPs. SWBT had refused to compensate TW Comm for such calls according to the reciprocal compensation rates in the interconnection agreement, based on its contention that those calls were not "local" in nature.

The Commission rejected SWBT's position and concluded that the calls in controversy were subject to the interconnection agreement's provisions relating to reciprocal compensation for the transport and termination of local traffic. In reaching this conclusion, the Commission first examined the nature of an ISP-bound call. It found that a call over the Internet consists of two components: (1) the information service component, which is the content of the call, and (2) the telecommunications service component, which is the carrier-to-carrier and carrier-to-end-user transmission of the call. With respect to the latter, the Commission concluded that when a person calls an ISP within a local calling area, the traffic carried on the call's transmission path is local in nature, with the telecommunications service component of the call terminating at the ISP.¹²⁴

Having reached this conclusion, the Commission then found that the scope of the definition of "local traffic" in the interconnection agreement included ISP traffic. The

¹²³ *Complaint and Request for Expedited Ruling of Time Warner Communications*, Docket No. 18082, Order (Feb. 27, 1998).

¹²⁴ In finding that such traffic is local in nature, the Commission rejected SWBT's end-to-end analysis of an ISP-bound call, which viewed the call as terminating at the website or websites ultimately accessed by the calling party, rather than at the ISP.

interconnection agreement's definition stated that, for reciprocal compensation purposes, "local traffic" includes (1) a call that originates and terminates in the same SWBT exchange area, or (2) originates and terminates within different SWBT exchanges that share a common mandatory calling area, *e.g.*, mandatory EAS, mandatory extended local calling service (ELCS), or any other service with a mandatory expanded local calling scope. The definition did not distinguish types of calls (*i.e.*, Internet versus voice), but rather focused upon the area in which the call originated and terminated. Therefore, if a call to an ISP originated and terminated within the same exchange or mandatory calling area, the traffic terminating at the ISP constituted "local traffic" and, consequently, was subject to the reciprocal compensation rates for such traffic, as specified in the interconnection agreement.

3. Other Post-Interconnection Agreement Disputes

Other post-interconnection agreement disputes between ILECs, including SWBT, and CLECs involving the same issue arose after the Commission's ruling in Docket No. 18082. In those subsequent proceedings interpreting specific interconnection agreements, the Commission applied the precedent established in Docket No. 18082 in finding that the transport and termination of calls to ISPs is subject to reciprocal compensation.¹²⁵

4. Docket No. 21982

In Docket No. 21982,¹²⁶ the Commission approved permanent rates for inter-carrier compensation relating to the transport and termination of local traffic between SWBT and certain CLECs. Specifically, the rates provided reciprocal compensation for the inter-office transport, end-office switching, and tandem switching of local traffic. The Commission determined that a

¹²⁵ See *Petition of Waller Creek Communications, Inc. for Arbitration with Southwestern Bell Telephone Company*, Docket No. 17922, Order Approving Interconnection Agreement (April 28, 1998); *Complaint of Taylor Communications Group, Inc. Against Southwestern Bell Telephone Company*, Docket No. 18975, Order No. 3 (May 4, 1998); *Complaint and Request for Expedited Ruling of Golden Harbor of Texas, Inc.*, Docket No. 19160, Arbitrator's Decision (June 30, 1998); *Petition for Arbitration Pursuant to FTA § 252(b) to Establish Interconnection Agreement with GTE Southwest Incorporated*, Docket No. 20028, Arbitration Award (Feb. 22, 1999); *Complaint of MFS Against GTE Southwest, Inc. Regarding GTE's Nonpayment of Reciprocal Compensation*, Docket No. 21706, Preliminary Order (April 13, 2000).

¹²⁶ *Proceeding to Examine Reciprocal Compensation Pursuant to Section 252 of the Federal Telecommunications Act of 1996*, P.U.C. Docket No. 21982 [Revised Arbitration Award (Aug. 31, 2000); Final Order (March 5, 2001)].

call to an ISP is subject to reciprocal compensation rates to the extent that such a call originates from and terminates to end-users, including ISPs, within the same local calling area.

The Commission reaffirmed its previous determination that reciprocal compensation arrangements apply to calls that originate from and terminate to an end-user within a mandatory single or multi-exchange local calling area, including the mandatory EAS/ELCS areas comprised of SWBT exchanges and the mandatory EAS/ELCS areas comprised of SWBT exchanges and exchanges of independent ILECs.¹²⁷ Consistent with this precedent, the Commission concluded that optional EAS traffic was not subject to reciprocal compensation.¹²⁸ The Commission also found that to the extent that FX-type and 8YY traffic did not terminate within a mandatory local calling scope, they were not eligible for reciprocal compensation. However, the Commission held that its findings with regard to optional EAS and FX-type traffic did not preclude the parties affected by the Award from negotiating and/or arbitrating appropriate compensation related to such traffic in other proceedings in which interconnection agreements may be addressed.¹²⁹ The Commission reiterated that its Award in Docket No. 21982 did not preclude CLECs from establishing their own local calling areas or prices for purpose of retail telephone service offerings.¹³⁰

5. Docket No. 24015

Docket No. 24015,¹³¹ determined that "all ISP-Bound traffic, whether provisioned via an FX/FX-type arrangement or not, is subject to the compensation mechanism contained in the FCC's *ISP Remand Order*".¹³² The Arbitrators reiterated that "all ISP-bound traffic is subject to

¹²⁷ First Mega-Arbitration Award ¶58; Project No. 16251, Order No. 55, Attachment 12 ¶1.1. *See also* Evaluation of the Public Utility Commission of Texas, *In the Matter of Application of SBC Communications Inc., and Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. D/B/A/ Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Texas Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region*, CC Docket No. 00-4, at 88 (Jan. 31, 2000); Project No. 16251, Final Staff Report on Collaborative Process at 103-104 (Nov. 18, 1998).

¹²⁸ First Mega-Arbitration Award ¶59.

¹²⁹ *Proceeding to Examine Reciprocal Compensation Pursuant to Section 252 of the Federal Telecommunications Act of 1996*, Docket No. 21982, Revised Arbitration Award, at 18, footnote 59 (Aug. 31, 2000).

¹³⁰ First Mega-Arbitration Award ¶59.

¹³¹ *Consolidated Complaints and Requests for Post-Interconnection Dispute Resolution Regarding Inter-Carrier Compensation for "FX-Type" Traffic Against Southwestern Bell Telephone Company*.

¹³² Arbitration Award pp. 30-31, Docket No. 25188.

the FCC's *ISP Remand Order*" in the Revised Arbitration Award issued on August 28, 2002. The Revised Arbitration Award noted that the Commission had limited the scope of its review with regard to FX traffic compensation in previous Awards, allowing subsequent proceedings to examine the particulars of whether or not traffic was originating and terminating within a mandatory local calling scope. Further, the Arbitrators noted that the Commission "declined to address the question of compensation for FX traffic that did not meet the requirements being applied to all other types of local traffic".¹³³ The Award and Revised Award conclude that it is necessary to segregate and track FX traffic, whether ISP-bound or not, from all other traffic, using a ten digit screening methodology, to ascertain appropriate compensation.

It is important to note that, neither the Award in Docket No. 21982 or in Docket No. 24015 addresses the impact of FX-type traffic wherein there is no local exchange calling area ISP presence and which allows the CLEC to collect the ISP-bound traffic in the local exchange calling area to transport to ISPs located outside of the local service area boundaries.

B. Relevant Federal Communications Commission Decisions

1. Declaratory Ruling

In 1999, in conjunction with a notice of proposed rulemaking, the Federal Communications Commission (FCC) issued a Declaratory Ruling concluding that "ISP-bound traffic is jurisdictionally mixed and appears to be largely interstate."¹³⁴ However, in the absence of a federal rule regarding the appropriate inter-carrier compensation for this traffic, the FCC concluded that parties should be bound by their existing interconnection agreements, as interpreted or imposed by state commissions under their authority to arbitrate interconnection disputes under FTA §252.¹³⁵

¹³³ *Revised Arbitration Award*, memorandum p. 3, Docket No. 24015.

¹³⁴ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic*, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, 14 FCC Rcd 3689 at ¶1 (rel. Feb. 26, 1999) (Declaratory Ruling).

¹³⁵ *Id.*

The FCC concluded that the ISP traffic does not terminate at the ISP's local server but instead continues to the ultimate destination(s), often an Internet website in another state.¹³⁶ The FCC declined to separate ISP-bound traffic into two components: an intrastate telecommunications service, and an interstate information service.¹³⁷ In so doing, the FCC analyzed ISP traffic for jurisdictional purposes as a continuous transmission from the end user to a distant Internet site.¹³⁸

The FCC found that a state commission's decision to impose reciprocal compensation obligations upon ISP-bound traffic in an arbitration proceeding does not conflict with any FCC rule regarding ISP-bound traffic.¹³⁹ The FCC noted that FTA §252(b)(5), and FCC rules promulgated thereunder, concern inter-carrier compensation for local telecommunications traffic. However, in so noting, the FCC concluded that ISP-bound traffic is non-local interstate traffic.¹⁴⁰ Pending completion of the rulemaking initiated as a part of the *Declaratory Order*, the FCC found that state commissions were not precluded from determining that reciprocal compensation is an appropriate interim inter-carrier compensation rule, pursuant to contractual principles or other legal or equitable considerations.¹⁴¹

2. ISP Remand Order

On April 27, 2001, the FCC released an Order reconsidering the proper treatment for purposes of inter-carrier compensation of telecommunications traffic delivered to ISPs.¹⁴² The FCC modified its analysis in the *Declaratory Order* to conclude that Congress excluded traffic identified in FTA §251(g), including traffic destined for ISPs, from the definition of "telecommunications" traffic subject to reciprocal compensation.¹⁴³ Accordingly, although for different reasons than set out in the *Declaratory Order*, the FCC found that the provisions of

¹³⁶ *Id.* ¶12.

¹³⁷ *Id.* ¶13.

¹³⁸ *Id.*

¹³⁹ *Id.* ¶26.

¹⁴⁰ *Id.*; also fn. 87.

¹⁴¹ *Id.* ¶27.

¹⁴² *In the Matter of Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68, Order on Remand and Report and Order, FCC 01-131 (rel. Apr. 27, 2001) (*ISP Remand Order*).

¹⁴³ *Id.* ¶1.

FTA §251(g) do not extend to ISP-bound traffic, reaffirmed its previous conclusion that traffic delivered to an ISP is predominantly interstate access traffic subject to FTA §201, and established a cost recovery mechanism for the exchange of ISP-bound traffic.¹⁴⁴ In effect, the FCC concluded that ISP bound traffic was not local traffic but predominantly interstate traffic. Thus, a national policy was required. In particular, the FCC initiated a 36-month transition towards a complete bill-and-keep recovery system.¹⁴⁵

Based upon the record before it, the FCC determined that bill-and-keep appears to be the preferable cost recovery mechanism for ISP-bound traffic because it eliminates a substantial opportunity for regulatory arbitrage.¹⁴⁶ The FCC noted that its goal is decreased reliance by carriers upon carrier-to-carrier payments and an increased reliance upon recovery of costs from end-users.¹⁴⁷ This goal reflects the FCC's concern regarding two troubling effects of the classic regulatory arbitrage caused by Internet usage. First, it created incentives for inefficient entry of LECs intent on serving ISPs exclusively and not offering viable local telephone competition, as Congress had intended to facilitate with the 1996 Act. And secondly, the large one-way flows of cash made it possible for LECs serving ISPs to afford to pay their own customers to use their services, potentially driving ISP rates to consumers to uneconomical levels.¹⁴⁸ The FCC found unpersuasive arguments proffered by CLECs that requiring them to recover more of their costs from their ISP customers will render it impossible for CLECs profitably to serve ISPs or will lead to higher rates for Internet access. Moreover, the FCC observed that there is no public policy to support a subsidy running from all users of basic telephone service to those end-users who employ dial-up Internet access.¹⁴⁹

Finally, the FCC noted that the Eighth Circuit observed that pre-existing regulatory treatments of services (access charges) were not expected to move to a cost based pricing immediately and that those services enumerated under §251(g) are therefore "carved out" from

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* ¶7.

¹⁴⁶ *Id.* ¶6.

¹⁴⁷ *Id.* ¶7.

¹⁴⁸ *Id.* ¶21.

¹⁴⁹ *Id.* ¶87.

the purview of §251(b).¹⁵⁰ The FCC further reasoned, from this observation of the Eight Circuit, that services which when analyzed are equivalent to two LECs providing access service to an ISP's end-users fall within the §251(g) standards.¹⁵¹ The FCC then noted that such services were subject to FCC or state jurisdiction whether those obligations implicated pricing policies or reciprocal compensation.¹⁵² This latter conclusion of the FCC's *ISP Remand Order* is pertinent to the Arbitration at hand.

C. Relevant Court Decisions

1. Bell Atlantic Telephone Companies v. FCC

On March 24, 2000, the District of Columbia Circuit Court vacated the FCC's *Declaratory Order* regarding inter-carrier compensation for ISP-bound traffic.¹⁵³ The court remanded the FCC decision to the federal commission because the FCC did not properly explain why ISP-bound traffic should not be subject to reciprocal compensation. The court found that the FCC's ruling was premised on its decision to employ an end-to-end analysis traditionally used for jurisdictional purposes in determining whether particular traffic is interstate.¹⁵⁴ The FCC utilized the end-to-end analysis to demonstrate why ISP-bound traffic is interstate traffic, not terminating local telecommunications traffic and why the traffic is "exchange access" rather than "telephone exchange service."¹⁵⁵ The court went on to examine the FCC's statutory and policy justifications regarding its ISP-bound traffic finding. Ultimately, the court found that the FCC had not explained why the end-to-end analysis "is relevant to discerning whether a call to an ISP should fit within the local call model of two collaborating LECs or the long-distance model of a long-distance carrier collaborating with two LECs."¹⁵⁶ Consequently, the court vacated the *Declaratory Order* and remanded the case to the FCC. After the federal court's ruling, the FCC issued the *ISP Remand Order* discussed above.

¹⁵⁰ *ISP Remand Order*, ¶38 re: *Comptel*, 117 F.3d at 1073.

¹⁵¹ *Id.* at ¶39.

¹⁵² *Id.* at ¶39.

¹⁵³ *Bell Atl. Tel. Companies v. FCC*, 206 F.3d 1 (D.C.Cir. 2000).

¹⁵⁴ *Bell Atl. Tel.*, 206 F.3d at 5.

¹⁵⁵ *Bell Atl. Tel.*, 206 F.3d at 4, 5.

¹⁵⁶ *Bell Atl. Tel.*, 206 F.3d at 5; *ISP Remand Order* at ¶¶16, 25, and 53.

Issue DPL No.	Appendix/ Section	CENTURYTEL's Proposed Contract Language	Level 3's Proposed Contract Language	CENTURYTEL's Position	Level 3's Position	Arbitrators' Contract Language	Arbitrators' Position
1. ISF-Bound Traffic Interconnection does require the under Federal law	Article I (paragraph 1)	Article I (paragraph 1) Pursuant to this Agreement, and to the extent required by the Act and other applicable provisions of federal and state law, the Parties will enter into certain arrangements to one another within each area in which they both operate within the State for purposes of interconnection and the exchange of Local Traffic between their respective end-user customers.	Article I (paragraph 1) Pursuant to this Agreement, and to the extent required by the Act and other applicable provisions of federal and state law, the Parties will enter into certain arrangements to one another within each area in which they both operate within the State for purposes of interconnection and the exchange of Local Traffic between their respective end-user customers.	ISF-bound traffic is not within the jurisdiction of a state commission. Under the Section 201 authority, the FCC has taken all authority over ISF-bound traffic away from the state commissions. CenturyTel has no obligation to transport or terminate Level 3's ISF-bound traffic under Section 251(a) of the Communications Act of 1934, as amended. Furthermore, CenturyTel has no obligation to interconnect with Level 3 under Section 251(c) of the Act.	Level 3 does not contend that pursuant to federal law, ISF-bound traffic is subject to different intercarrier compensation rules than local traffic. However, in promulgating its new intercarrier compensation rules with respect to ISF-bound traffic, the FCC made clear that it did not intend to change in any respect its interconnection rules that apply. Therefore, even if the contract's intercarrier compensation terms need to be different, ISF-bound traffic remains subject to the same interconnection rules as local traffic and should be handled under an agreement applying the same interconnection terms as for local traffic.	Article I (paragraph 1) Pursuant to this Agreement, and to the extent required by the Act and other applicable provisions of federal and state law, the Parties will enter into certain arrangements to one another within each area in which they both operate within the State for purposes of interconnection and the exchange of Local Traffic between their respective end-user customers.	The Arbitrators have concluded that the FCC's ISF-Bound Order applies to intercarrier compensation applicable to the delivery of ISF-bound traffic and that it does not alter other carrier obligations. However, the Arbitrators are not persuaded by Level 3's logic that the interconnection rules of local traffic will necessarily apply. The Arbitrators conclude that a more specific review of the contract language will be required when Level 3 provides the specific network design to CenturyTel for development of interconnection agreements terms.
	Article II 1.43	Article II, 1.43 Information Access Traffic (IAT) Information Access Traffic means the provision of specialized exchange telecommunications services ... in connection with the origination, termination, transmission, switching, forwarding or routing of telecommunications traffic to or from the facilities of an Information Service Provider ("ISP"), as defined in the Communications Act of 1934, CC Telecommunications Act of 1994, CC Decist 94-49 and Interconnection Compensation for ISF-Bound Traffic, CC Decist No. 98-48, FCC 91-131, Order on Remand and Report and Order (2001). Information Access is governed by Section 201(a) and is excluded from Section 201(b)(6) of the Act.	Article II, 1.43 Level 3 proposes to strike the section in its entirety.	Interconnection and intercarrier compensation arrangements related to ISF-bound traffic must be addressed in an agreement separate from a Section 251-253 interconnection agreement. Alternatively, while those issues can be addressed in an interconnection agreement, the state may not enforce ISF-related issues as a part of its Section 253 review of the interconnection agreement.	Article II, 1.43 Strike the section in its entirety.	Article I, 1.43 Strike Level 3 Language.	Arbitrators conclude that a more specific review of the contract language will be required when Level 3 provides the specific network design to CenturyTel for development of interconnection agreements terms.
	Article II 1.46(a)	Article II, 1.46(a) CenturyTel would strike Level 3 Language.	Article I, 1.46(a) Traffic originated by a customer of one Party to this Agreement that is delivered to an ISP served by the other Party.			Article V, 1.1 This Article governs the provision of inter-network facilities (i.e., physical facilities).	Therefore, the DPL language decisions reached here are based upon the information provided to date in this arbitration proceeding.
	Article V, 1.1	Article V, 1.1 This Article governs the provision of inter-network facilities (i.e., physical facilities).	Article V, 1 This Article governs the provision of			Article V, 1.1 New Service Requests - Level 3 initiates orders for trunk-to-trunk interconnection services by sending an ASR to CenturyTel. The ordering process is described in the CenturyTel Guide. The ASR will be reviewed by CenturyTel for validation and correction of errors. Errors will be returned back to LEVEL 3. LEVEL 3 then will correct any errors that CenturyTel has identified and resubmit the request to CenturyTel through a supplemented ASR.	

Arbitration Award
Attachment B - Decision Point List Matrix

Issue	Appendix/Section	CENTURYTEL's Proposed Contract Language	Level 3's Proposed Contract Language	CENTURYTEL's Position	Level 3's Position	Arbitrators' Contract Language	Arbitrators' Position
Issue V, 3.2.1	Article V, 3.2.1	<p>The Parties agree to exchange traffic associated with third party LECs, CLECs and Wireless Service Providers pursuant to the compensation arrangement specified in Section 3.5 hereof. In addition, the Parties will notify each other of any anticipated change in traffic to be exchanged (e.g., traffic type, volume).</p> <p>The Parties agree to exchange traffic associated with third party LECs, CLECs and Wireless Service Providers pursuant to the compensation arrangement specified in Section 3.5 hereof. In addition, the Parties will notify each other of any anticipated change in traffic to be exchanged (e.g., traffic type, volume).</p>	<p>Article V, 3.2.1</p> <p>The Parties shall compensate each other for the exchange of Local Traffic originated by or terminating in the Parties' end-user customer in accordance with Section 3.2.2 of the Article. The Parties agree to the third party level compensation. This level compensation shall be set forth in Appendix A. The Parties will be updated quarterly in the manner or as the Parties otherwise agree.</p> <p>Once the traffic that is exempt from local compensation can be measured, the actual exempt traffic will be used rather than the above factor. Charges for the transport and termination of optional EAS, WATS/ATA toll and interchanges with the Parties' respective networks or networks access tariff, as appropriate.</p> <p>Any compensation due between the Parties in connection with the exchange of information Access Traffic minutes shall be in accordance with the Parties' respective networks or networks access tariff, as appropriate.</p>			<p>Article V, 3.2.1</p> <p>The Parties agree to the exchange of Local Traffic originated by or terminating in the Parties' end-user customer in accordance with Section 3.2.2 of the Article. The Parties agree to the third party level compensation. This level compensation shall be set forth in Appendix A. The Parties will be updated quarterly in the manner or as the Parties otherwise agree.</p> <p>Once the traffic that is exempt from local compensation can be measured, the actual exempt traffic will be used rather than the above factor. Charges for the transport and termination of optional EAS, WATS/ATA toll and interchanges with the Parties' respective networks or networks access tariff, as appropriate.</p> <p>Any compensation due between the Parties in connection with the exchange of information Access Traffic minutes shall be in accordance with the Parties' respective networks or networks access tariff, as appropriate.</p>	<p>Article V, 3.2.1</p> <p>The Parties agree to the exchange of Local Traffic originated by or terminating in the Parties' end-user customer in accordance with Section 3.2.2 of the Article. The Parties agree to the third party level compensation. This level compensation shall be set forth in Appendix A. The Parties will be updated quarterly in the manner or as the Parties otherwise agree.</p> <p>Once the traffic that is exempt from local compensation can be measured, the actual exempt traffic will be used rather than the above factor. Charges for the transport and termination of optional EAS, WATS/ATA toll and interchanges with the Parties' respective networks or networks access tariff, as appropriate.</p> <p>Any compensation due between the Parties in connection with the exchange of information Access Traffic minutes shall be in accordance with the Parties' respective networks or networks access tariff, as appropriate.</p>
Issue V, 3.2.2	Article V, 3.2.2	<p>The Parties agree to exchange traffic associated with third party LECs, CLECs and Wireless Service Providers pursuant to the compensation arrangement specified in Section 3.5 hereof. In addition, the Parties will notify each other of any anticipated change in traffic to be exchanged (e.g., traffic type, volume).</p> <p>The Parties agree to exchange traffic associated with third party LECs, CLECs and Wireless Service Providers pursuant to the compensation arrangement specified in Section 3.5 hereof. In addition, the Parties will notify each other of any anticipated change in traffic to be exchanged (e.g., traffic type, volume).</p>	<p>Article V, 3.2.2</p> <p>The Parties shall compensate each other for the exchange of Local Traffic originated by or terminating in the Parties' end-user customer in accordance with Section 3.2.2 of the Article. The Parties agree to the third party level compensation. This level compensation shall be set forth in Appendix A. The Parties will be updated quarterly in the manner or as the Parties otherwise agree.</p> <p>Once the traffic that is exempt from local compensation can be measured, the actual exempt traffic will be used rather than the above factor. Charges for the transport and termination of optional EAS, WATS/ATA toll and interchanges with the Parties' respective networks or networks access tariff, as appropriate.</p> <p>Any compensation due between the Parties in connection with the exchange of information Access Traffic minutes shall be in accordance with the Parties' respective networks or networks access tariff, as appropriate.</p>			<p>Article V, 3.2.2</p> <p>The Parties agree to the exchange of Local Traffic originated by or terminating in the Parties' end-user customer in accordance with Section 3.2.2 of the Article. The Parties agree to the third party level compensation. This level compensation shall be set forth in Appendix A. The Parties will be updated quarterly in the manner or as the Parties otherwise agree.</p> <p>Once the traffic that is exempt from local compensation can be measured, the actual exempt traffic will be used rather than the above factor. Charges for the transport and termination of optional EAS, WATS/ATA toll and interchanges with the Parties' respective networks or networks access tariff, as appropriate.</p> <p>Any compensation due between the Parties in connection with the exchange of information Access Traffic minutes shall be in accordance with the Parties' respective networks or networks access tariff, as appropriate.</p>	<p>Article V, 3.2.2</p> <p>The Parties agree to the exchange of Local Traffic originated by or terminating in the Parties' end-user customer in accordance with Section 3.2.2 of the Article. The Parties agree to the third party level compensation. This level compensation shall be set forth in Appendix A. The Parties will be updated quarterly in the manner or as the Parties otherwise agree.</p> <p>Once the traffic that is exempt from local compensation can be measured, the actual exempt traffic will be used rather than the above factor. Charges for the transport and termination of optional EAS, WATS/ATA toll and interchanges with the Parties' respective networks or networks access tariff, as appropriate.</p> <p>Any compensation due between the Parties in connection with the exchange of information Access Traffic minutes shall be in accordance with the Parties' respective networks or networks access tariff, as appropriate.</p>

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Issue DPL NO.	Appendix/ Section	CENTURYTEL's Proposed Contract Language	Level 3's Proposed Contract Language	Level 3's Position	Arbitration/Contract Language	Arbitrator's Position
		<p>EAS, Intra-LATA toll and interexchange traffic shall be in accordance with the Parties' respective intrate and interstate access tariffs, as appropriate.</p> <p><i>CenturyTel would utilize the Level 2 Additional Tariffs</i></p>	<p>respective intrate and interstate access tariffs, as appropriate. Any compensation due between the Parties in connection with the exchange of information Access Traffic shall be in accordance with the FCC's Order on Request and Report and Order 88, as released on April 27, 2001, and other provisions of applicable law. Payment to the FCC's Order on Request and Report and Order 88-48 and 88-49, MF-based Traffic shall be subject to a Bill-and-Keep Arrangement.</p>		<p>On transport and termination of optional EAS, Intra-LATA toll and interexchange traffic shall be in accordance with the Parties' respective intrate and interstate access tariffs, as appropriate. Any compensation due between the Parties in connection with the exchange of information Access Traffic shall be in accordance with the FCC's Order on Request and Report and Order 88-48 and 88-49, MF-based Traffic shall be subject to a Bill-and-Keep Arrangement.</p>	<p>The Parties are in agreement that the definition of toll-free numbers is not subject to the parties' dispute. The parties have agreed that the definition of toll-free numbers is not subject to the parties' dispute.</p>
4.	Definition of Bill-and-Keep Paragraph 4.	<p>Article 3.1.1 A compensation arrangement whereby the Parties do not receive bills in each other for the termination of Local Traffic specified in this Agreement and whereby the Parties terminate local exchange traffic originating from end-users served by the networks of the other Party without explicit charging arising or between toll carriers for such traffic exchange.</p>	<p>Article 3.1.1 A compensation arrangement whereby the Parties do not receive bills in each other for the termination of Local Traffic specified in this Agreement and whereby the Parties terminate local exchange traffic originating from end-users served by the networks of the other Party without explicit charging arising or between toll carriers for such traffic exchange.</p>	<p>Bill and Keep is not an appropriate compensation structure for Level 3's proposed ISP-based traffic. The ISP Order on Request and Report and Order 88-48 and 88-49, MF-based Traffic shall be subject to a Bill-and-Keep Arrangement.</p>	<p>Article 3.1.1 A compensation arrangement whereby the Parties do not receive bills in each other for the termination of Local Traffic specified in this Agreement and whereby the Parties terminate local exchange traffic originating from end-users served by the networks of the other Party without explicit charging arising or between toll carriers for such traffic exchange.</p>	<p>The Parties should define "Bill-and-Keep" as that term is specifically defined in the ISP Order on Request and Report and Order 88-48 and 88-49, MF-based Traffic shall be subject to a Bill-and-Keep Arrangement.</p>
		<p>Article 3.1.2 A compensation arrangement whereby the Parties do not receive bills in each other for the termination of Local Traffic specified in this Agreement and whereby the Parties terminate local exchange traffic originating from end-users served by the networks of the other Party without explicit charging arising or between toll carriers for such traffic exchange.</p>	<p>Article 3.1.2 A compensation arrangement whereby the Parties do not receive bills in each other for the termination of Local Traffic specified in this Agreement and whereby the Parties terminate local exchange traffic originating from end-users served by the networks of the other Party without explicit charging arising or between toll carriers for such traffic exchange.</p>	<p>Bill and Keep is not an appropriate compensation structure for Level 3's proposed ISP-based traffic. The ISP Order on Request and Report and Order 88-48 and 88-49, MF-based Traffic shall be subject to a Bill-and-Keep Arrangement.</p>	<p>Article 3.1.2 A compensation arrangement whereby the Parties do not receive bills in each other for the termination of Local Traffic specified in this Agreement and whereby the Parties terminate local exchange traffic originating from end-users served by the networks of the other Party without explicit charging arising or between toll carriers for such traffic exchange.</p>	<p>The Parties should define "Bill-and-Keep" as that term is specifically defined in the ISP Order on Request and Report and Order 88-48 and 88-49, MF-based Traffic shall be subject to a Bill-and-Keep Arrangement.</p>

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